IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 22, 2005

AMERICAN INDUSTRIES SERVICES, INC. v. HERMAN S. HOWARD ET AL.

Appeal from the Chancery Court for Davidson County
No. 01-3079-III Ellen Hobbs Lyle, Chancellor

No. M2003-01656-COA-R3-CV - Filed April 25, 2006

This appeal involves a dispute between a fulfillment company and two former customers regarding the payment of storage charges. In the first lawsuit brought by the customers, the Chancery Court for Davidson County determined that the fulfillment company's storage fees were reasonable and directed the customers to pay $278,047 to defray part of the storage charges. Thereafter, the fulfillment company filed a second lawsuit in the trial court seeking to recover the balance of its storage charges. When the former customers attempted to re-litigate the reasonableness of its storage charges, the fulfillment company filed a motion for summary judgment asserting collateral estoppel. The trial court granted the fulfillment company's motion and awarded the fulfillment company $106,785 plus prejudgment interest. The former customers have appealed. We affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN, J., joined. PATRICIA J. COTTRELL, J., not participating.

Donald Capparella, Nashville, Tennessee; Roane Waring III and Dennis P. Hawkins, Memphis, Tennessee (on the brief), for the appellants, Herman S. Howard, The Media Group, Inc., and American Direct Marketing.

Kenneth M. Bryant, E. Todd Presnell, and David L. Johnson, Nashville, Tennessee, for the appellee, American Industries Services, Inc.

OPINION

I.

American Industries Services, Inc. (American Industries) provides fulfillment services to companies who market their products directly to the public. Its business consists of storing merchandise owned by direct marketers and then shipping these products at the marketer's direction to the marketer's customers. Since the mid-1980s, American Industries had a contract to provide

fulfillment services to The Media Group, Inc. (Media Group) and American Direct Marketing, Inc. (American Direct). Both Media Group and American Direct are owned by Herman S. Howard.[1]

The business relationship between the companies deteriorated over time, and on May 11, 2000, the Howard parties filed suit against American Industries in the Chancery Court for Davidson County alleging, among other things, fraud and breach of fiduciary duty. The trial court issued a temporary restraining order on May 11, 2000 directing American Industries to continue providing storage and fulfillment services to the Howard parties pending a preliminary injunction hearing. The court also directed the Howard parties to pay 50% of the storage charges to American Industries, and to place the remaining 50% of the storage charges in escrow pending the resolution of the parties' dispute.

The Howard parties informed the trial court during the hearing on the preliminary injunction that they were negotiating with another fulfillment company and requested an extension of the temporary injunction to finalize the transfer of their merchandise to a new fulfillment company. They also requested the trial court to establish "reasonable prices" for American Industries' services in the meantime. On May 31, 2000, the trial court issued a preliminary injunction directing American Industries to continue providing the Howard parties with fulfillment services until June 23, 2000. The court also declined to adjust the storage and fulfillment fees American Industries was charging the Howard parties. Accordingly, the "reasonable prices" for American Industries storage and fulfillment services remained the prices the parties had already agreed to.

When the Howard parties declined to pay their storage and fulfillment charges, American Industries requested the trial court to dissolve the preliminary injunction requiring it to continue providing fulfillment and storage services to them. On June 15, 2000, the trial court filed an order dissolving the injunction after concluding that the Howard parties had not been making the required payments

The Howard parties did not completely remove their merchandise from American Industries' warehouse until February 13, 2001. Despite the trial court's earlier orders, they had paid no fulfillment or storage fees to American Industries from May 11, 2000 through February 13, 2001. On February 28, 2001, American Industries filed a petition in the trial court seeking to hold the Howard parties in civil contempt for wilfully refusing to pay the accumulated fulfillment and storage fees. American Industries also requested a judgment for $278,047.55[2] plus prejudgment interest. The Howard parties responded by asserting that they were entitled to offsetting credits "which will substantially decrease, if not consume, the amounts being claimed."

The trial court conducted a hearing on April 5, 2001. The Howard parties did not challenge American Industries' rate for its fulfillment services but did question the manner in which American

[1] Media Group, American Direct, and Mr. Howard will be referred to collectively as the "Howard parties."

[2] This amount included the fulfillment fees and 50% of the storage fees that the Howard parties should have paid to American Industries between May 11, 2000 and February 13, 2001. It did not include the remaining 50% of the storage fees that the Howard parties were required to place in escrow.

Industries calculated the unpaid fulfillment charges. The Howard parties also challenged American Industries' storage rates as well as some of its loading charges. On April 6, 2001, the trial court filed an order directing the Howard parties to pay American Industries $278,047.55 by April 12, 2001. The amount of this judgment reflected all the accrued fulfillment fees and 50% of the accrued storage fees.

The Howard parties failed to pay American Industries $278,047.55 by the court-imposed deadline. Finally, on June 29, 2001, following the trial court's threat to dismiss their claims against American Industries, the Howard parties paid $278,047.55 to American Industries. However, they failed to pay the remaining 50% of the storage charges into an escrow account as the trial court had previously ordered. On August 1, 2001, the trial court dismissed the Howard parties' claims against American Industries because of their failure to respond to discovery requests.[3]

On October 4, 2001, American Industries filed a complaint in the Chancery Court for Davidson County against the Howard parties seeking to recover $106,785 in unpaid storage charges. American Industries later filed a motion for summary judgment. The Howard parties opposed the motion by arguing that American Industries' storage fees were not fair or reasonable. On May 20, 2003, the trial court filed a memorandum opinion and order concluding that the parties had already litigated the amount of merchandise that had been stored by American Industries and the reasonableness of American Industries' storage fees and, therefore, that the doctrine of collateral estoppel prevented the Howard parties from re-litigating these issues. Accordingly, the trial court ordered the Howard parties to pay American Industries $106,785.00 plus $19,096.74 in prejudgment interest. The Howard parties have appealed.

II.

The standards for reviewing summary judgments on appeal are well settled. Summary judgments are proper in virtually any civil case that can be resolved on the basis of legal issues alone. *Fruge v. Doe*, 952 S.W.2d 408, 410 (Tenn. 1997); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001). They are not, however, appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. Thus, a summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion – that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001).

The party seeking a summary judgment bears the burden of demonstrating that no genuine dispute of material fact exists and that it is entitled to a judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002); *Shadrick v. Coker*, 963 S.W.2d 726, 731 (Tenn. 1998). To be entitled to a judgment as a matter of law, the moving party must either affirmatively negate an

[3]This court affirmed the dismissal of the Howard parties' complaint. *Howard v. Am. Indus. Servs., Inc.*, No. M2001-02711-COA-R3-CV, 2002 WL 31769115 (Tenn. Ct. App. Dec. 11, 2002) (No Tenn. R. App. P. 11 application filed).

essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Byrd v. Hall*, 847 S.W.2d at 215 n.5; *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

Once the moving party demonstrates that it has satisfied Tenn. R. Civ. P. 56's requirements, the non-moving party must demonstrate how these requirements have not been satisfied. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997). Mere conclusory generalizations will not suffice. *Cawood v. Davis*, 680 S.W.2d 795, 796-97 (Tenn. Ct. App. 1984). The non-moving party must convince the trial court that there are sufficient factual disputes to warrant a trial (1) by pointing to evidence either overlooked or ignored by the moving party that creates a factual dispute, (2) by rehabilitating evidence challenged by the moving party, (3) by producing additional evidence that creates a material factual dispute, or (4) by submitting an affidavit in accordance with Tenn. R. Civ. P. 56.07 requesting additional time for discovery. *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Byrd v. Hall*, 847 S.W.2d at 215 n.6. A non-moving party that fails to carry its burden faces summary dismissal of the challenged claim because, as our courts have repeatedly observed, the "failure of proof concerning an essential element of the cause of action necessarily renders all other facts immaterial." *Alexander v. Memphis Individual Practice Ass'n*, 870 S.W.2d 278, 280 (Tenn. 1993).

A summary judgment is not appropriate when a case's determinative facts are in dispute. However, for a question of fact to exist, reasonable minds must be able to differ over whether some alleged occurrence or event did or did not happen. *Conatser v. Clarksville Coca-Cola Bottling Co.*, 920 S.W.2d 646, 647 (Tenn. 1995); *Harrison v. S. Ry. Co.*, 31 Tenn. App. 377, 387, 215 S.W.2d 31, 35 (1948). If reasonable minds could justifiably reach different conclusions based on the evidence at hand, then a genuine question of fact exists. *Louis Dreyfus Corp. v. Austin Co.*, 868 S.W.2d 649, 656 (Tenn. Ct. App. 1993). If, on the other hand, the evidence and the inferences reasonably drawn from the evidence would permit a reasonable person to reach only one conclusion, then there are no material factual disputes, and the question can be disposed of as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d at 695; *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86, 91 (Tenn. 1999); *Beaudreau v. Gen. Motors Acceptance Corp.*, 118 S.W.3d 700, 703 (Tenn. Ct. App. 2003).

Summary judgments enjoy no presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003); *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 285 (Tenn. 2001). Accordingly, appellate courts must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We must consider the evidence in the light most favorable to the non-moving party, and we must resolve all inferences in the non-moving party's favor. *Godfrey v. Ruiz*, 90 S.W.3d at 695; *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001). When reviewing the evidence, we must determine first whether factual disputes exist. If a factual dispute exists, we must then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

III.

The sole issue raised by the Howard parties on this appeal involves the trial court's reliance on the doctrine of collateral estoppel. They assert that the doctrine does not bar their defense to American Industries' claim for unpaid storage fees because the defense is predicated on the manner in which American Industries applied its rates rather than the reasonableness of the rates themselves. We find no merit in this argument because the parties had established the correct amount of storage fees the Howard parties owed to American Industries in their prior litigation.

A.

Collateral estoppel is an issue preclusion doctrine devised by the courts. *Dickerson v. Godfrey*, 825 S.W.2d 692, 694 (Tenn. 1992); *Beaty v. McGraw*, 15 S.W.3d 819, 824 (Tenn. Ct. App. 1998). Like other preclusion doctrines, its purposes are to promote finality, to conserve judicial resources, to relieve litigants from the cost and vexation of multiple lawsuits, and to encourage reliance on judicial decisions by preventing inconsistent decisions. *Gibson v. Trant*, 58 S.W.3d 103, 113 (Tenn. 2001); *Trinity Indus., Inc. v. McKinnon Bridge Co.*, 147 S.W.3d 225, 232 (Tenn. Ct. App. 2003). The collateral estoppel doctrine applies to both issues of fact and issues of law. *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 179 (Tenn. Ct. App. 2000).

Judge Henry J. Friendly succinctly explained issue preclusion when he observed over forty years ago that "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Zdanok v. Glidden* Co., 327 F.2d 944, 953 (2d Cir. 1964). Thus, as our courts have construed the collateral estoppel doctrine, it bars the same parties or their privies from relitigating in a second suit issues that were actually raised and determined in an earlier suit. *State v. Scarbrough*, 181 S.W.3d 650, 654-55 (Tenn. 2005); *Massengill v. Scott*, 738 S.W.2d 629, 631 (Tenn. 1987). Stated another way, when an issue has been actually and necessarily determined in a former action between the parties, that determination is conclusive against them in subsequent litigation. *Gibson v. Trant*, 58 S.W.3d at 113; *King v. Brooks*, 562 S.W.2d 422, 424 (Tenn. 1978); *State ex rel. Cihlar v. Crawford*, 32 S.W.3d at 179.

The party seeking to rely on the doctrine of collateral estoppel has the burden of proof. *State v. Scarbrough*, 181 S.W.3d at 655; *Dickerson v. Godfrey*, 825 S.W.2d at 695. In order to invoke the doctrine successfully, the party must demonstrate (1) that the issue sought to be precluded is identical to the issue decided in the earlier suit; (2) that the issue sought to be precluded was actually litigated and decided on its merits in the earlier suit; (3) that the judgment in the earlier suit has become final; (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier suit; and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier suit to litigate the issue now sought to be precluded. *Trinity Indus., Inc. v. McKinnon Bridge Co.*, 147 S.W.3d at 232-33; *Beaty v. McGraw*, 15 S.W.3d at 824-25.

When a party invokes the collateral estoppel doctrine, the court must first ascertain what issue or issues were actually decided in the first proceeding. For the purpose of this analysis, an "issue" is any disputed point or question raised by the parties' pleadings concerning which the parties

desire a decision. 18 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 132.02[1] (3d ed. 2005). The court must then determine what issue or issues are involved in the second proceeding and must compare the issues in the two proceedings to determine whether they are identical. For the collateral estoppel doctrine to apply, the issue sought to be precluded in the second proceeding must be identical, not merely similar, to the issue decided in the first proceeding. *Trinity Indus., Inc. v. McKinnon Bridge Co.*, 77 S.W.3d 159, 185 (Tenn. Ct. App. 2001); *Beaty v. McGraw*, 15 S.W.3d at 827.

B.

This case fits squarely into the principles and purpose of the doctrine of collateral estoppel. All five factors for invoking the doctrine are clearly present. During the parties' first lawsuit, they litigated the reasonableness of the storage charges as well as the amount of the Howard parties' merchandise that American Industries claimed that it stored. The Howard parties took issue with both the fulfillment charges and storage charges claimed by American Industries and had a full and fair opportunity to present evidence to contest those charges. The trial court ultimately determined that American Industries' storage charges were reasonable and that the Howard parties failed to present a valid defense for their nonpayment. By doing so, the trial court necessarily decided that the rate and the assessment of American Industries' storage charges were reasonable.

The Howard parties did not appeal from the trial court's April 6, 2001 order. Instead, they paid the fulfillment charges and 50% of the storage charges. American Industries was forced to file the second lawsuit because the Howard parties had failed to pay the remaining storage charges that had already been adjudged to be reasonable. The Howard parties should not be allowed to have a second chance to challenge the storage rates simply because their nonpayment has forced American Industries back into litigation to collect the amounts it is owed. The Howard parties are collaterally estopped from asserting in American Industries' suit to collect the remaining storage charges that the charges are unreasonable or unfair. Accordingly, the trial court properly granted summary judgment for American Industries.

IV.

We affirm the trial court's May 20, 2003 order granting summary judgment to American Industries Servies, Inc. We remand this case to the trial court for any further proceedings consistent with this opinion and tax the costs of this appeal to Herman S. Howard, The Media Group, Inc., and American Direct Marketing, Inc. and their surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.